

interstate commerce or in the production of goods for such commerce.⁸

(b) *On both covered and non-covered work.* If the employee is engaged in both covered and non-covered work during the workweek he is entitled to the benefits of the Act for the entire week regardless of the amount of covered activities which are involved. The covered activities must, however, be regular or recurring rather than isolated, sporadic or occasional.⁹

(c) *On covered construction projects.* All employees who are employed in connection with construction work which is closely or intimately related to the functioning of existing instrumentalities and channels of interstate commerce or facilities for the production of goods for such commerce are within the scope of the Act. Closely or intimately related construction work includes the maintenance, repair, reconstruction, redesigning, improvement, replacement, enlargement or extension of a covered facility.¹⁰ If the construction project is subject to the Act, all employees who participate in the integrated effort are covered, including not only those who are engaged in work at the site of the construction such as mechanics, laborers, handymen, truckdrivers, watchmen, guards, timekeepers, inspectors, checkers, surveyors, payroll workers, and repair men, but also office, clerical, bookkeeping, auditing, promotional, drafting, engineering, custodial and stock room employees.¹¹

⁸ *Mitchell v. Joyce Agency*, 348 U.S. 945, affirming 110 F. Supp. 918; *Fleming v. Sondeck*, 132 F. (2d) 77 (C.A. 5), certiorari denied 318 U.S. 772; *Kirschbaum v. Walling*, ante; *Walling v. McCrady Construction Co.*, 156 F. (2d) 932, certiorari denied 329 U.S. 785; *Mitchell v. Brown Engineering Co.*, 224 F. (2d) 359 (C.A. 8), certiorari denied 350 U.S. 875; *Chambers Construction Co. and L. H. Chambers v. Mitchell*, decided June 5, 1965 (C.A. 8).

⁹ See General Coverage Bulletin, §§ 776.2 and 776.4

¹⁰ *Walling v. McCrady Const. Co.*, 156 F. (2d) 932, certiorari denied 329 U.S. 785; *Chambers Construction Co. and L. H. Chambers v. Mitchell*, decided June 5, 1956 (C.A. 8); *Tobin v. Pennington-Winter Const. Co.* ante; *Mitchell v. Vollmer & Co.*, ante.

¹¹ *Mitchell v. Brown Engineering Co.*, ante; *Chambers Construction Co. and L. H. Chambers*

(d) *On non-covered construction projects.* (1) A construction project maybe purely local and, therefore, not covered, but some individual employees may nonetheless be covered on independent ground by reason of their interstate activities. Under the principle that coverage depends upon the particular activities of the employee and not on the nature of the business of the employer, individual employees engaged in interstate activities are covered even though their activities may be performed in connection with a non-covered construction project. Thus, the Act is applicable to employees who are regularly engaged in ordering or procuring materials and equipment from outside the State or receiving, unloading, checking, watching or guarding such goods while they are still in transit. For example, laborers on a non-covered construction project who regularly unload materials and equipment from vehicles or railroad cars which are transporting such articles from other States are performing covered work.¹²

(2) Similarly, employees who regularly use instrumentalities of commerce, such as the telephone, telegraph and mails for interstate communication are within the scope of the Act, as are employees who are regularly engaged in preparing, handling, or otherwise working on goods which will be sent to other States. This includes the preparation of plans, orders, estimates, accounts, reports and letters for interstate transmittal.

§ 776.24 Travel in connection with construction projects.

The Act also applies to employees who regularly travel across State lines in the performance of their duties, even though the construction project itself

v. Mitchell, ante; *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334 (C.A. 9).

¹² *Clyde v. Broderick*, 144 F. (2d) 348 (C.A. 10); *Durnil v. J. E. Dunn Construction Co.* 186 F (2d) 27 (C.A. 8), *Donahue v. George A. Fuller Co.*, 104 F. Supp. 145; Cf. *Mitchell v. Royal Baking Co.*, 219 F. (2d) 532 (C.A. 5).

is not covered.¹³ If an employee regularly transports persons, materials, or equipment between jobs across State lines, or to a covered project, even within the State, as part of his duties for the contractor, he would be covered. As in other situations, the Act would not apply if crossing State lines or transporting persons, materials or equipment by the employee was isolated or sporadic rather than regular and recurring. Also, ordinary home-to-work travel, even across State lines, is not covered.

§ 776.25 Regular and recurring activities as basis of coverage.

Regular and recurring may mean a very small amount and is not to be determined by volume or percentages. Coverage depends on the character rather than the volume of the employee's activities. For example, if an employee in the course of his duties regularly engages in covered work even though the covered work constitutes only a small part of his duties, he would be covered in any week when he performs such covered work.¹⁴

§ 776.26 Relationship of the construction work to the covered facility.

Unless the construction work is physically or functionally integrated or closely identified with an existing covered facility it is not regarded as covered construction because it is not closely enough related to or integrated with the production of goods for commerce or the engagement in commerce. For this reason the erection, maintenance or repair of dwellings, apartments, hotels, churches and schools are not covered projects.¹⁵ Similarly the construction of a separate, wholly new, factory building, not constructed as an integral part or as an improvement of an existing covered production plant, is not covered (Cf. § 776.27(c)). Coverage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential

it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is "new construction" nor the fact that it is physically separated from an existing covered plant, is determinative. Moreover, the court decisions make it clear that the construction project itself need not be actually employed in commerce or in the production of goods for commerce during the time of its construction in order to be covered.¹⁶ Such factors may be considered in determining whether as a practical matter the work is directly and vitally related to the functioning of the covered facility but would not be decisive.

§ 776.27 Construction which is related to covered production.

(a) *Existing production establishments.*

(1) Covered production facilities within the concept of the Act include mines, oil wells, banks, manufacturing, packing and processing plants, filtration, sewage treatment, electric power and water plants, shipyards, warehouses in which goods are broken down, packed or handled preparatory to being sent in interstate commerce, and similar establishments.

(2) The repair or maintenance of a covered production unit is essential for its continued operation and has a close and immediate tie with the production of goods for commerce.¹⁷ The Act is also applicable to other construction which is an integral part of a covered production unit, such as the replacement, enlargement, reconstruction, extension or other improvement of the premises, the buildings, the machinery, tools and dies and other equipment. Functionally such work is like maintenance and repair and is necessary for the continued, efficient and effective operation of the facility as a unit. Thus the construction of new appurtenances of a covered production establishment such as parking aprons, access roads, railroad spurs, drainage ditches, storm,

¹³ *Reck v. Zarmacay*, 264 App. Div. 520, 36 N.Y.S. (2d) 394; *Colbeck v. Dairyland Creamery Co.*, 17 N.W. (2d) 262 (S. Ct. S.D.).

¹⁴ *Walling v. Jacksonville Paper Co.*, ante; *Mabee v. White Plains Publishing Co.*, 327 U.S. 178.

¹⁵ Cf. § 776.18(b).

¹⁶ *Mitchell v. Vollmer*, ante; *Bennett v. V. P. Loftis Co.*, ante; *Mitchell v. Chambers Const. Co.*, 214 F. (2d) 515 (C.A. 10); *Walling v. McCrady Const. Co.*, ante; *Tobin v. Pennington-Winter Const. Co.*, 198 F. (2d) 334 (C.A. 5), certiorari denied, 345 U.S. 915.

¹⁷ *Kirschbaum Co. v. Walling*, ante; *Walling v. McCrady Const. Co.*, ante.